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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 75-265

NOLAN ESTES, et al

Petitioners,

versus

EDDIE MITCHELL TASBY, et al

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION
TO THE PETITION FOR WRIT OF CERTIORARI

Respondents appear herein to oppose the Petition for Writ of Certiorari in the above captioned and numbered cause filed by Nolan Estes, et al, requesting review of the Judgment of the United States Court of Appeals for the Fifth Circuit entered July 23, 1975. Respondents are the plaintiff-appellants in the courts below.

I. QUESTIONS PRESENTED

The issues set out in the Petition for Writ of Certiorari are as follows: (1) whether the district court erred in adopting a minimal student assignment plan together with a visual-audio media communications system for "integrating"

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I. QUESTIONS PRESENTED

The issues set out in the Petition for Writ of Certiorari are as follows: (1) whether the district court erred in adopting a minimal student assignment plan together with a visual-audio media communications system for "integrating" schools, leaving dozens of one-race schools in tact within the petitioner district; and (2) whether Section 258 of the Equal Educational Opportunities Act of 1974, 20 U.S.C. §1757 prohibits the court of appeals and/or district court from

entering any order requiring transportation of students from one school to another prior to the beginning of the next school academic year, that being 1976-1977.

Respondents submit that neither issue or contention forms a basis for this Court granting the Writ of Certiorari prayed for by petitioners.

II. STATEMENT OF THE CASE

Petitioners' statement of the case, while not totally inaccurate, is misleading concerning the ultimate fact conclusions of the courts below. For instance, petitioners represent to this Court that respondents utilized a 90%-10% formula to establish the existence of one-race schools within the DISD. Such was not the case at all. What respondents did offer the trial court were exhibits indicating how many schools were segregated by race to that extent. They never represented to the trial court that such was the measure of determining whether a school was one-race or not. The United States Court of Appeals for the Fifth Circuit concluded that respondents only intended the 90%-10% comparison for illustrative purposes. Respondents submit that this is the only proper conclusion based upon the record evidence before the trial court and the court of appeals.

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Additionally, petitioners will have this Court believe that they have eliminated one-race secondary schools pursuant to the plan adopted by the trial court. Such was and is absolutely not the case. Petitioners have attached on page 93a of their Petition for Writ of Certiorari the senior high, and on page 94a, the junior high compositions

suggested in the plan ultimately adopted by the trial court. These figures are grossly misleading. For one, none of the high schools or junior high schools represented on these pages in fact has experienced the attendance ratio set forth in the tables. Substantially all of the high schools and junior high schools, with a few exceptions, have operated at levels at or near a 90% one-race configuration. Petitioners also do not inform this Court that nealry 100 of the elementary schools operated by the district continued to be populated by students predominantly of one race or another.

The trial court's (and petitioners') approach in "desegregating" the secondary schools was to assign just enough students to create student bodies at or slightly under a 90% one race ratio; that is, they assigned students in such a way that no school was more "integrated" than 90%-10% white to balck or vice versa.

The Fifth Circuit in its opinion setting aside the student assignment plan noted that such plan adopted a neighborhood concept of student assignment. This assignment produced no change in racial characteristics of the one-race elementary schools operated by petitioners. As such, the Court of Appeals found the plan unconstitutional. It noted

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The Fifth Circuit in its opinion setting aside the student assignment plan noted that such plan adopted a neighborhood concept of student assignment. This assignment produced no change in racial characteristics of the one-race elementary schools operated by petitioners. As such, the Court of Appeals found the plan unconstitutional. It noted that this Court in several decisions has required nothing less than the elimination of predominantly one-race schools in the establishment of a unitary school system. The Fifth Circuit also concluded that the 90% figure utilized by plaintiffs for demonstrative purposes was merely that, and not intended to represent a "magic level" below which a school

would no longer be categorized as "one-race" (Tasby v. Estes, __F.2d__, slip opinion at 6949, July 23, 1975.) The court of appeals finally concluded that the petitioners' efforts to desegregate at various school facilities failed to indicate a bona fide effort to comply with the mandates of the Supreme Court (Tasby v. Estes, supra, slip opinion at 6949).

If respondents correctly understand the Petition for Writ of Certiorari, no objection is made to the court of appeals determinations concerning site selection-school construction; the status of Mexican-American plaintiffs within the petitioner district; the reporting requirements imposed upon the school district by the court of appeals' opinion; the teacher assignement ratio set out in that opinion, or any matter other than student assignment. For this reason, respondents have confined their remarks to the student assignment portions of the July 23, 1975 Opinion of the United States Court of Appeals for the Fifth Circuit.

III. REASONS FOR DENYING THE WRIT

Petitioners have represented to this Court that there is constitutional authority for allowing a school district such as the DISD to operate literally dozens of one-race schools on the pretext that by and through audio-visual communications students can be integrated. There is no authority in law or in equity to support this conten-

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Petitioners have represented to this Court that there is constitutional authority for allowing a school district such as the DISD to operate literally dozens of one-race schools on the pretext that by and through audio-visual communications students can be integrated. There is no authority in law or in equity to support this contention. Clearly, there is no comfort for petitioners in the language of Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971). There is as well no support for petitioners' contentions in any other decision of this Court

or of the United States Court of Appeals for the Fifth Circuit. Quite the contrary, there is ample authority supportive of the decision of the Fifth Circuit reversing the trial court's student assignment plan. See: Green v. County School Board of New Kent County, Virginia, 391 U.S. 430 (1968); Alexander v. Holmes County Board of Education, 396 U.S. 19 (1969); Singleton v. Jackson Municipal Separate School District, 419 F.2d 1211 (5th Cir. 1969); and Flax v. Potts, 464 F.2d 865 (5th Cir. 1972), cert. den. __U.S.__ (1973).

No where does the court of appeals' decision herein conflict with the decision of this Court in Swann v. Mecklenburg Board of Education, supra. Rather, it completely and totally follows the mandate of Swann. When this Court held that the elimination of predominantly one-race schools was a requirement for an integrated school system, it meant precisely that. Clearly, the court of appeals in ordering the dismantlement of the DISD dual system on such basis is not inconsistent with Swann, but rather follows its directions in the most logical sense. Petitioners' construction of Swann to the contrary is at best tortured.

SECTION 258 OF THE EDUCATIONAL OPPORTUNITIES ACT OF 1974 CANNOT PREVENT THE DISMANTLEMENT OF THE

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SECTION 258 OF THE EDUCATIONAL OPPORTUNITIES ACT OF 1974 CANNOT PREVENT THE DISMANTLEMENT OF THE DUAL SCHOOL SYSTEM

This Court in its decision of Alexander v. Holmes County Board of Education, supra, clearly and succinctly held that further delays in the dismantlement of the dual system will not be tolerated by the courts. In so holding, this Court was interpreting the Equal Protection Clause of

the Fourteenth Amendment to the United States Constitution. There is little doubt in constitutional law that should an Act of Congress be inconsistent with the Constitution, or its amendments, the act must give way. Respondents submit that the court of appeals' decision was not inconsistent with the above Act of Congress. Moreover, if petitioners thought the act in question to be controlling they never informed the court of appeals through brief or other means of such position. Petitioners have first represented that notion to this Court. They somehow contend that this statute prevents the order of the court of appeals for the Fifth Circuit dated July 23, 1975 from having operative effect.

The statute in issue does not speak to the court of appeals and its action here at all. The very language of the statute directs its terms to the implementation of student transportation orders contained in a student assignment plan. No transportation plan has been ordered by any court to this date pursuant to the opinion of the Fifth Circuit dated July 23, 1975. As such petitioners' contentions are at best premature.

Respondents submit that the essence of petitioners'

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Respondents submit that the essence of petitioners' statutory claim is a contention that an Act of Congress can alter or impede the Fourteenth Amendment and its requirements. This, respondents submit, cannot be the case. If the statute is intended to delay desegregation of a school district found to be operating a racially based dual system, that statute can not stand constitutional muster.

For the foregoing reasons the Petition for Writ of Certiorari should be denied in all respects.

Respectfully submitted,

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By _____
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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing was mailed this 11th day of September, 1975, by United States Mail, postage prepaid, to:

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